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In The

Supreme Court of the United States

October Term, 1982

ALLEN J. WRIGHT, JR.,

Petitioner,

vs.

DEFENSE LOGISTICS AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

When a party has substantially prevailed in an action to obtain information under the Freedom of Information Act, 5 U.S.C. §552, for the purpose of furthering the objectives of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, and 5 U.S.C. §7201, should attorneys fees and costs be allowed?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Jurisdiction 1

Statutes and Regulations Involved 2

Statement of the Case 7

Reasons for Granting the Writ:

The decision is contrary to the principles enunciated by this Court and the case presents an important question of law which should be resolved by this Court. 8

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

Caminetti v. United States, 242 U.S. 470 (1970) 9

Cazales v. U.S. Department of Justice, 660 F. 2d 612 (5th Cir. 1981) 12

Contents

Page

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) 11

Ferri v. Bell, 645 F. 2d 1213 (3d Cir. 1981) 11

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 11

Statutes Cited:

Civil Rights Act of 1964, 42 U.S.C. §2000e..... i

42 U.S.C. §2000e-5(k) 3, 11

42 U.S.C. §2000e-16 .....2, 7, 11

Freedom of Information Act, 5 U.S.C. §552 .....i, 2, 7

5 U.S.C. §552(a)(4)(E).....8, 11

5 U.S.C. §7201 ..... i, 4, 7, 11

Regulation Cited:

5 C.F.R. 720.204 5

Other Authority Cited:

U.S. Code Cong. & Admin. News, 1974, P. 6267, 6288 9

Contents

Page

APPENDIX

Decision on Petition for Rehearing in the United States Court of Appeals for the Third Circuit 1a

Decision on Appeal by the United States Court of Appeals for the Third Circuit 2a

Opinion and Order of the United States District Court, Eastern District of Pennsylvania 4a

Complaint 12a

Answer 26a

No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Court of Appeals rendered decisions without opinion (1a, 2a). The opinion of the District Court (4a) is not reported.

JURISDICTION

The initial judgment of the Court of Appeals (2a) was made and entered January 17, 1983. A petition for rehearing was denied and entered February 11, 1983 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The Freedom of Information Act as amended, 5 U.S.C. §552, provides in relevant part as follows at (a)(4):

> "(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * *
>
> (E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."

2. The Civil Rights Act of 1964, as amended, provides in relevant part as follows at 42 U.S.C. §2000e-16:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United

States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * *

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

* * *

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government."

42 U.S.C. §2000e-5:

"(k) In any action or proceeding under this subchapter the court, in its discretion, may allow

the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

3. 5 U.S.C. §7201 provides in relevant part:

"§7201. Antidiscrimination policy; minority recruitment program

(a) For the purpose of this section—

(1) 'underrepresentation" means a situation in which the number of members of a minority group designation (determined by the Equal Employment Opportunity Commission in consultation with the Office of Personnel Management, on the basis of the policy set forth in subsection (b) of this section) within a category of civil service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage that the minority constituted within the labor force of the United States, as determined under the most recent decennial or mid-decade census, or current population survey, under title 13, and

* * *

(b) It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.

(c) Not later than 180 days after the date of the enactment of the Civil Service Reform Act of 1978, the Office of Personnel Management shall, by regulation, implement a minority recruitment program which shall provide, to the maximum extent practicable—

(1) that each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in education institutions, and from other sources from which minorities can be recruited. . . ."

4. 5 C.F.R. 720.204 provides in relevant part:

"(a) Each Executive agency having positions in the pay systems covered by this program must conduct a continuing program for the recruitment of minorities and women for positions in the agency and its components to carry out the policy of the United States to insure equal employment opportunities without discrimination because of race, color, religion, sex or national origin.

* * *

(c) Where an agency or the Office of Personnel Management has determined that an applicant pool does not adequately provide for

consideration of candidates from any underrepresented group, the agency or agency component must take one or more of the following actions:

(1) Expand or otherwise redirect their recruitment activities in ways designed to increase the number of candidates from underrepresented groups in that applicant pool;

(2) Use selection methods involving other applicant pools which include sufficient numbers of members of underrepresented groups;

(3) Notify the office responsible for administering that applicant pool, and request its reopening of application receipt in support of expanded recruitment activities or certifying from equivalent registers existing in other geographic areas; and/or

(4) Take such other action consistent with law which will contribute to the elimination of underrepresentation in the category of employment involved. . . ."

5. Respondent's pertinent regulations provided:

"1. The Federal Equal Opportunity Recruitment Plan (FEORP), a part of DPSC's 1980 Affirmative Action Plan, details supervisory responsibility for management of employees in underrepresented categories. These categories have been broken-out by occupational series and grade. A listing has been furnished to each directorate/office.

> 2. When an employee from the underrepresented category appears on a referral register and is not selected, reasons justifying non-selection will be in writing. Director/Office Chiefs must review all such cases, either concur or nonconcur; and if concur, assure strong justification, and then staff through EEO for comment/recommendation of any selection. Impasses will be processed through appropriate relief channels.".

STATEMENT OF THE CASE

Jurisdiction of the United States District Court arose under the Freedom of Information Act, 5 U.S.C. §552.

Petitioner, a black male, applied for promotion to a position which was in a category which was "underrepresented" for blacks. He was found qualified and referred to the selecting official on a list of qualified candidates. He was not selected. A white male was selected. Respondent's regulations required that when an employee from the underrepresented category appears on a referral register and is not selected, reasons justifying non-selection be in writing. Petitioner sought information to support a claim of discrimination in violation of 42 U.S.C. §2000e-16 and 5 U.S.C. §7201. The respondent refused to furnish the information and petitioner instituted this action alleging two causes of action (12a). Each cause of action related to separate and different refusals. The first was based upon refusal to furnish a complete copy of the justification for non-selection. The second cause related to refusal to furnish copies of referral lists, a list of all specified applicants and a list of unqualified applicants. Respondent's answer (26a), in effect, admitted the material allegations of the complaint.

As a result of this action respondent, without an order of the court, furnished all the information sought under the first cause of action and a portion of the information sought under the second cause of action. The balance of the information sought under the second cause of action was furnished under a stipulation and order which precluded the petitioner from divulging same without the court's permission. In a portion of the court's opinion the court adverts to this stipulation and order and states that all of the information was obtained under this order and that therefore none of the information could be disclosed (9a), however, this is contradicted by the court's statements in the same opinion (5a) which is in accord with the above recital of facts.

Petitioner thereafter applied for attorneys' fees and costs. The motion was denied. Petitioner moved for reconsideration. After argument additional papers were filed pursuant to the court's direction. There was no evidentiary hearing. With memorandum opinion and order dated May 18, 1982, the Court denied the motion for attorneys' fees and costs. The Court of Appeals affirmed. A petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

The decision is contrary to the principles enunciated by this Court and the case presents an important question of law which should be resolved by this Court.

The only condition for recovery of attorneys' fees and costs set forth in the plain language of the statute 5 U.S.C. §552(a)(4)(E) is that the complainant substantially prevail.

Instead of enforcing the law in accordance with its plain language, the lower courts have engrafted on the statute four criteria, *viz.*, (1) benefit to the public; (2) commercial benefit to the complainant; (3) the nature of the interest in the records sought;

and (4) whether the government's withholding had a reasonable basis in law. The justification for the use of these criteria is that Congress so intended.

In fact, the Congress did not so intend. The Conference Report stated that the Senate proposed to include said criteria in the Act, but they were eliminated. The report states:

> "By eliminating these criteria, the conferees do not intend to make the Award of attorney fees automatic or to preclude the Courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary." U.S. Code Cong. & Admin. News, 1974, P. 6267, 6288.

It is thus clear that limiting relief to the criteria stated above is not in consonance with congressional intent and that the cases that have adopted said criteria have read into the statute what Congress specifically rejected.

Here, because of the plain language of the statute, the criteria would not apply even if Congress so intended. *Caminetti v. United States,* 242 U.S. 470 (1917). In the latter case, the Court stated at page 485:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the Constitutional authority of the law making body which passed it, the sole function of the Courts is to enforce it according to its terms. . . .

> Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. . . .
>
> Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

It further stated at page 490:

> "Reports to Congress accompanying the introduction of proposed laws may aid the Courts in reaching the true meaning of the legislature in cases of doubtful interpretation . . . But . . . when awards are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. . . ."

According to the plain language of the statute, if the plaintiff substantially prevails, the plaintiff is entitled to attorneys' fees and costs.

Furthermore, in this case we have another important principle.

The lower court found that the information requested was for the purpose of seeking information which may lead to a civil rights action and reversal of an allegedly discriminatory

employment decision; but that the public has no interest in this and petitioner was therefore not entitled to attorneys' fees. It distinguished this from *Ferri v. Bell,* 645 F. 2d 1213 (3rd Cir. 1981) which held that a similar action by a convicted criminal seeking information which may lead to reversal of his conviction involved a public interest in the administration of justice (8a, 9a).

It is submitted that this refusal to recognize the public interest in eliminating discrimination is in direct opposition to the principles enunciated by this Court in *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968) and *Christiansburg Garment Co. v. Equal Employment Opportunity Commission,* 434 U.S. 412 (1978).

Juxtaposition of the provisions of the Freedom of Information Act, 5 U.S.C. §552(a)(4)(E) and the Civil Rights Act of 1964 at 42 U.S.C. §2000e-5(k) reflects no material difference.

The Court should look to the purpose of the statute which was to make information available. It should also consider the purpose for which information is sought — whether such information furthers another congressional purpose such as the elimination of discrimination as mandated by the Civil Rights Act of 1964, in this case 42 U.S.C. §2000e-16 — and the elimination of underrepresentation as mandated by 5 U.S.C. §7201 and should apply the criteria pertaining to 42 U.S.C. §2000e-5(k). Thus, where the purpose of seeking the information is to further the objectives of overcoming discrimination, the petitioner is in the position of "a private attorney general, vindicating a policy that Congress considered of the highest priority", and petitioner should "ordinarily recover an attorneys' fees unless special circumstances would render such an award unjust". *Newman v. Piggie Park Enterprises, supra; Christiansburg Garment Co. v. E.E.O.C., supra.*

Furthermore, the refusal to recognize that information sought to overcome discrimination may support a claim for attorneys'

fees is in conflict with the decision of the Fifth Circuit in *Cazalas v. U.S. Dept. of Justice,* 660 F. 2d 612 (1981).

It should be noted that the court's statement that petitioner's action has not resulted in more information being made available to the public than was available before the petitioner brought the FDA action (9a) is based on the fact that certain information made available under the order of the court could not be revealed except by order of the court. The fact is as stated at the beginning of the court's decision (5a), all of the information sought under the first cause of action and much of the information sought in the second cause of action was obtained as a result of the action without the order of the court and was not subject to the limitations of the order of the court. Furthermore, the respondent had no reasonable excuse for not furnishing this information.

CONCLUSION

It is submitted that the petition for certiorari should be granted.

Respectfully submitted,

HARRY D. SHARGEL
Attorney for Petitioner

APPENDIX

DECISION ON PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1426

ALLEN J. WRIGHT, JR.,

Appellant

v.

DEFENSE LOGISTICS AGENCY

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Weis
Judge

Dated: February 11, 1983

DECISION ON APPEAL BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1426

ALLEN J. WRIGHT, JR.,

Appellant

v.

DEFENSE LOGISTICS AGENCY

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 81-1416)

District Judge: Honorable Charles R. Weiner

Submitted Pursuant to Third Circuit Rule 12(6)
January 10, 1983

Before: WEIS, SLOVITER, and BECKER, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Decision on Appeal

Costs taxed against appellant.

BY THE COURT,

s/ Weis
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk
DATED: Jan. 17, 1983

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLEN J. WRIGHT, JR.

V.

DEFENSE LOGISTICS AGENCY

C.A. NO. 81-1416

Weiner, J. May 18, 1982

Presently before the court is the plaintiff's motion for reconsideration of this court's denial, by Memorandum Opinion and Order of October 15, 1981, of plaintiff's motion for attorney's fees and litigation costs pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552(a)(4)(E). After reconsideration and review of all memoranda, documents, and arguments submitted by the parties, we affirm our previous order denying attorney's fees and costs.

This matter originated with plaintiff's request for particular documents from defendant under the FOIA, 5 U.S.C. §552. Portions of the documents requested by plaintiff were denied by the head of the Defense Personnel Support Center (DPSC). Defendant based its denial on Exemption 6 of FOIA which exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6).

Opinion and Order

Plaintiff's complaint sets forth two causes of action, each action relating to separate and distinct refusals by DPSC to furnish the information requested.[1] The first cause of action was based upon defendant's refusal to furnish an unexpurgated copy of the justification for the nonselection for a management position in the agency, of the plaintiff, a member of a group which was underrepresented within the agency. The second cause of action was based upon DPSC's refusal to furnish copies of referral lists, a list of all qualified applicants and a list of all unqualified applicants under two Job Opportunity Announcements.

By order dated July 27, 1981, this court approved a stipulation entered into by the parties, and ordered release to plaintiff's counsel of the requested documents, with the proviso that plaintiff and his counsel were not to release the information "to anyone for any purpose at any time" unless by further order of the court. Prior to that order plaintiff had received what is referred to as an "expurgated" copy of the agency's justification for nonselection, so poorly reproduced that handwritten comments at the top of the page were illegible. Also prior to our order, but in response to plaintiff's institution of suit and his motion for judgment on the pleadings, defendant, in its Motion for Summary Judgment with respect to the second cause of action, agreed to release the entire justification in the interest of expediting the resolution of the matter. Plaintiff had also received, prior to the July 27, 1981 order, the Promotion Certificate (referral lists) which indicated that it was an "amended list", (that is to

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1. The documents requested were personnel records and the request was made directly to DPSC. Plaintiff, who is a black male, believed he had been discriminated against in his failure to obtain an employment assignment. The documents he sought related to his reassignment and the assignment of another person to the position he desired.

say, that he had not been given a complete and unamended certificate).

The mere fact that the plaintiff has obtained the information he sought does not entitle him to an automatic award of attorney's fees. Statutory provision giving this court the ability to assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred under FOIA, is predicated upon a threshhold requirement that the complainant has "substantially prevailed" in the matter. 5 U.S.C. §552(a)(4)(E); *Westinghouse Elec. Corp. v. N.L.R.B.,* 497 F. Supp. 82 (W.D. Pa. 1980). However, "there is no presumption in favor of awarding attorney's fees in a FOIA case and. . .such an award is left to the sound discretion of the district judge." *Chamberlain v. Kurtz,* 589 F. 2d 827, 842 (5th Cir.), *cert. denied* 444 U.S. 582 (1979).

The plaintiff to recover attorney's fees under this statute "must show at a minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information." *Vermont Low Income Advocacy, Inc. v. Usery,* 546 F. 2d 509 (2d Cir. 1976). Plaintiff must demonstrate a causal nexus between the action and the agency's surrender of the information. *Fund for Constitutional Government v. National Archives and Records Service,* 656 F. 2d 856 (D.C. Cir. 1981). While meeting this test means that a plaintiff has "substantially prevailed", more is required for the court to exercise its discretion, and award attorney's fees. *Cuneo v. Rumsfeld,* 553 F. 2d 1360, 1365, (D.C. Cir. 1977).

According to the legislative history of Section 552(a)(4)(E), Congress intended that the district court's discretion in awarding attorney's fees be guided by the four criteria enumerated in the

Senate Conference report.[2] Those criteria are: (1) the benefit to the public derived from the case, if any; (2) the commercial benefit to the complainant; (3) the nature of the interest in the records sought; and (4) whether the government's withholding of the documents had a reasonable basis in law.[3] *See, Blue v. Bureau of Prisons,* 570 F. 2d 529, 533-534 (5th Cir. 1978).

The court must determine first, whether plaintiff substantially prevailed in the action. If plaintiff has substantially prevailed, then the court must exercise its discretion in determining whether the award of costs and attorney's fees is appropriate, relying on the criteria enumerated above and the existing body of law. *Cuneo v. Rumsfeld,* 553 F. 2d at 1365.

"To prevail substantially, in order to obtain attorney's fees and costs pursuant to the Freedom of Information Act, it is not necessary that a Plaintiff actually obtain a judgment in his favor." *Ford v. Selective Service System, U.S. Civil Service Commission,* 439 F. Supp. 1262, 1264 (M.D. Pa. 1977). Thus, that the plaintiff secured the documents he requested by stipulation of the parties and order of the court does not preclude the award of attorney's fees and costs. Applying the "substantially prevailed" standard established in *Vermont Low Income Advocacy Council, Inc. v. Usery, supra,* it appears that plaintiff has established the causative effect the filing of the suit had on the defendant's subsequent delivery of the information, and that he has therefore substantially prevailed. Plaintiff ultimately secured the names of all applicants

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2. S. Rep. No. 93-854, 93d Cong., 2d Sess. 19 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News, p. 6267.

3. S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News, pp. 6285, 6288.

for the position he sought, though subject to the limitation that the information so received not be disclosed to anyone except by court order.

Nevertheless, we decline to award attorney's fees and costs.

In response to plaintiff's claim that the agency's withholding of the documents was unreasonable, arbitrary and capricious, the government need demonstrate only that it had a reasonable basis in law to conclude that the information at issue was exempt; it need not prove that the information was exempt in fact. *LaSalle Extension University v. F.T.C.*, 627 F. 2d 481, 486 (D.C. Cir. 1980). The seriousness of an invasion of privacy is balanced against the public interest asserted by the plaintiff. *Wine Hobby USA, Inc. v. United States Internal Revenue Service,* 502 F. 2d 133 (3d Cir. 1974). We reiterate that upon balancing the interests of the parties, the agency had at least a colorable basis for its conclusion that disclosure of the documents would inflict an unwarranted invasion of privacy, and therefore we need not now decide the factual question regarding the invasion of privacy.

We must reject again plaintiff's reliance on *Ferri v. Bell,* 645 F. 2d 1213 (3d Cir. 1981). Not only did that case not deal with the issue of the award of attorney's fees, it involved a criminal defendant seeking information which possibly could lead to a new trial, reversal of his conviction and his release from prison. Although cognizant of the personal rather than public motivation behind the decision to seek FOIA information, the court recognized the public's interest in the administration of criminal justice and thus found that prong of the test for release of information under FOIA to be satisfied. Without denegrating the vitally important function of private civil rights actions to redress alleged racial discrimination by public officials in public agencies, we cannot

equate a FOIA action by a government employee seeking information which may lead to a civil rights action[4] and reversal of an allegedly discriminatory employment decision with a similar action by a convicted criminal seeking information which may lead to reversal of his conviction and his eventual release from prison.

We note again that the public, under the order of this court, is unable to obtain the information revealed to the plaintiff except by order of this court. Therefore, plaintiff's action has not resulted in more information being made available to the public than was available before the plaintiff brought the FOIA action.

In the absence of public benefit alone, denial of plaintiff's request for attorney's fees and costs is appropriate. However, absent such benefit to the public and in light of plaintiff's use of the information in his subsequent civil rights action, in which he demands an award of damages, we must interpret such use as a personal pecuniary benefit to the plaintiff, akin to the commercial benefit criterion, and deny the award of attorney's fees and costs on that basis as well. *Stein v. Department of Justice and Federal Bureau of Investigation,* 662 F. 2d 1245, 1263 (7th Cir., 1981); *Westinghouse Elec. Corp., supra,* at 85. (Espousing the denial of attorney's fees when FOIA litigation may have been used as the functional equivalent of civil discovery). It is difficult to avoid the conclusion that the information sought in this action was not requested by plaintiff for any purpose other than as a basis for a subsequent civil rights action arising out of his nonselection. Certainly no other purpose has been advanced, nor

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4. The plaintiff has in fact filed a civil rights action pursuant to 42 U.S.C. §§2000e-16 and 2000e-5 alleging racial discrimination. *Wright v. Grinstead,* C.A. No. 82-813.

does one come to mind, especially in light of the recent actual filing of such an action by plaintiff. This observation is not meant as a criticism of plaintiff, for he has done no more than attempt to exercise his constitutional and statutory rights, yet not every such attempt to secure FOIA assistance, even though resulting in a limited release of information to the plaintiff only and not the public, commands an award of attorney's fees and costs.

In light of the foregoing, plaintiff's motion for attorney's fees and costs is denied.

Opinion and Order

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLEN J. WRIGHT, JR.

v.

DEFENSE LOGISTICS AGENCY

C.A. NO. 81-1416

May 18, 1982

ORDER

Plaintiff's motion for the award of attorney's fees and reasonable costs incurred in litigation, pursuant to 5 U.S.C. §552(a)(4)(E), is DENIED.

IT IS SO ORDERED.

s/Charles R. Weiner
CHARLES R. WEINER

COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLEN J. WRIGHT, JR.

v.

DEFENSE LOGISTICS AGENCY

81-1416

FIRST CAUSE OF ACTION

1. Jurisdiction of this Court is invoked pursuant to 5 USC 552.

2. Plaintiff is a citizen of the United States and resident of the city of Philadelphia, Pennsylvania.

3. Defendant is an Agency of the United States Government, with a field activity known as Defense Personnel Support Center, hereinafer referred to as DPSC, located in the City of Philadelphia, Pennsylvania.

4. On March 11, 1981, Plaintiff made a request of DPSC pursuant to the Freedom of Information Act for a copy of a document, to wit, the Justification submitted in accordance with IOM, DPSC-C, dated April 1980, subject: Justification for Non-Selection of Underrepresented Groups" pertaining to JOA Nos. 1056-80 and 1057-80.

5. Defendant replied by letter dated March 30, 1981, Exhibit "A" hereof, wherein it furnished the requested information in part, but refused to furnish all of the information.

6. Said denial constitutes a final action of the Agency inasmuch as it was made more than ten days, excepting Saturdays, Sundays and legal public holidays, from the date of Plaintiff's request.

7. Said denial was arbitrary, capricious and designed to conceal information in violation of applicable laws and regulations.

SECOND CAUSE OF ACTION

8. Plaintiff reiterates the allegations set forth in paragraphs 1, 2 and 3 hereof.

9. On March 11, 1981, Plaintiff made a request of DPSC pursuant to the Freedom of Information Act for copies of the referral lists for JOA Nos. 1056-80 and 1057-80, and a list of all qualified and unqualified applicants for JOA Nos. 1056-80 and 1057-80.

10. Defendant replied by letter dated March 31, 1981, Exhibit "B" hereof, wherein it furnished part of the information but refused to furnish all of said information.

11. Said denial constitutes a final action of the Agency inasmuch as it was made more than ten days, excepting Saturdays, Sundays and legal public holidays, from the date of Plaintiff's request.

12. Said denial was arbitrary, capricious and designed to conceal information in violation of applicable law and regulations.

WHEREFORE, Plaintiff demands judgment as follows:

(1) Enjoin the Agency from withholding the Agency records and order the production of said records.

(2) Assess against United States reasonable attorney's fees and other litigation costs reasonably incurred.

(3) Determine that Agency personnel acted arbitrarily and capriciously with respect to the withholding of the information.

s/ Harry D. Shargel
HARRY D. SHARGEL
Attorney for Plaintiff
1201 Chestnut Street
Philadelphia, Pa. 19107
215-561-2360

Complaint

EXHIBIT A

DEFENSE LOGISTICS AGENCY
Headquarters, Defense Personnel Support Center
2800 South 20th Street
Philadelphia, Pennsylvania 19101

DPSC-C

Ref. No. 81-M-010

SUBJECT: Freedom of Information Act Request on Behalf of Mr. Allen Wright, DPSC-ZACI

Mr. Allen Wright
DPSC-ZACI

Dear Mr. Wright:

This is in response to your inter-office memorandum of 11 March requesting documents under the Freedom of Information Act, which was received by the custodian of records on the same date.

No memorandum exists for job announcement 1057-80 because none of the referred applicants were members of underrepresented groups.

In response to the other part of your request, concerning job opportunity announcement number 1056-80, enclosed is a copy of the memorandum of justification for non-selection of underrepresented groups.

Portions of it, however, have been deleted because it contained the names of other individuals in addition to the selectee. If

disclosed, such information would result in an unwarranted invasion of privacy. Its release is exempt under 5 U.S.C. 552(b)(6), and further implemented by DLA Regulation 5400.14.

Also, paragraph eight of the memorandum is being withheld under exemption five of the FOIA. It contains viewpoints by government personnel that are a part of the decision-making process. I have made a determination that a legitimate government purpose is being served by withholding the above items.

If you decide to appeal my decision to withhold portions of the information requested, it is to be made in writing to the Director, Defense Logistics Agency, Cameron Station, Alexandria, VA 22314. It is suggested that your appeal include the basis of your disagreement.

Sincerely,

s/ E.W. Bowers
Emmett W. Bowers
Major General, USA
Commanding

Encl

Complaint

INTER-OFFICE MEMORANDUM

Date: FEB 20 1981

Subject: Justification for Non-Selection of Members of Underrepresented Groups

From: DPSC-ZA (BOYLE/ma/2741)

To: DPSC-Z

1. Reference: OOA #1056-80, Supervisory Operating Account, GS-510-13 (Temporary).

2. GAO Report, "Financial Mismanagement of the Defense Personnel Support Center" concluded that DPSC had lost control of hundreds of millions of dollars of stock fund monies. A DLA project team headed by Brigadier General DEMoss, was established to review this situation and develop an overall plan for resolving DPSC's financial management problems. Recommendation Number 11 of the DEMoss Committee findings recommended reorganization of DPSC's Accounting & Finance Division. On 19 November 1980, during a briefing by Major General Bowers on the DPSC actions to implement the recommendations of the DEMoss Committee Report, Mr. Cassell, Comptroller, DLA suggested and Lt. General Post, Director, DLA approved, that DPSC recruit and bring on board as soon as possible two GS-510-13 Supervisory Operating Accountants to provide immediate high-grade talent to work on the reorganization and to ensure its prompt implementation. Because of the key role these positions play in reorganization and in subsequent efforts to reclaim the confidence of our Command, it was considered critical to identify and select the best qualified applicant.

3. Selection was based on a review of each applicant's 201 File or SF 171, a personal interview involving a standard set of questions, and a discussion with each applicant's supervisor regarding qualities determined to be essential to successful job performance. In certain instances, the applicant's supervisor was a competitor for the same position. In these cases, the next level supervisor was contacted for his evaluation. In the case of a his current supervisor was first unavailable because of TDY and then ill. In this instance, one personal references was contacted for his evaluation.

4. Qualities being sought by the selecting official were:

a. *Varied financial background.* Position involves management of a major DLA stock fund and a smaller but financially troubled Industrial Fund. Experience in assimilating various financial systems and concepts was expected to provide the flexibility needed to shift easily between each of these two divergent responsibilities.

b. *Experience in utilizing statistical concepts and data processing techniques.* Major responsibility of Branch Chief is to prepare for Comptroller's certification the year-end financial statments. In order to satisfy legal requirements, the Comptroller must be satisfied that unliquidated obligations are accurately reported. This Center has used and expects to continue to use statistical sampling techniques to achieve this goal. The Branch Chief should know more than just statistical concepts but be actually able to utilize and critique their results. The Medical Commodity is presently the only one at this Center under the Standard Automated Material Management System (SAMMS). The Branch Chief should be familiar with data processing conventions used in this system and be able to intelligently discuss

his problems/needs with both systems personnel and data processors. In addition, long-range plans include the mechanization of the now manually operated Industrial Fund.

c. *Proven supervisory ability.* The Medical/Industrial Fund Chief position requires the ability to successfully manage 40 to 45 people ranging in grades from GS-3 to GS-12 and to respond intelligently to supervisors in the Financial, Supply and Procurement chains. This was deemed to be the most important selection element and about half of the questions asked each applicant and three quarters of those asked their immediate supervisors related to performance in this element.

5. Upon completion of the interviews of applicants and supervisors, the selecting supervisor concluded that the referral list contained only one person with proven supervisory ability, a

The other candidates fell into one of four categories:

a. they had no supervisory experience;

b. they had no recent supervisory experience;

c. they had limited supervisory experience, with either small numbers of people or professional series personnel who needed little direction; or

d. they had performed only adequately in previous supervisory assignments at a level lower than that they were currently being interviewed for.

6. Given the lack of demonstrated outstanding supervisory ability, a decision was made to select based on an evaluation of each candidate's "supervisory potential." "Supervisory potential" was

determined to consist of demonstrated leadership and communication abilities. Leadership was defined as ability to show the way to others, both supervisor and employee alike. Communications was defined as ability to impart knowledge to all levels of the work force. Each supervisor had been asked during interviews to comment on these phases of an applicant's performance. In addition, the interview itself provided indications of the extent of each applicant's abilities.

7. Based on the criteria outlined above, Mr. Anthony Bachich was selected for the referenced position. Mr. Bachich was an auditor for over seven years with the Naval Audit Service. He had experience with financial management at a major Inventory Control Point and in smaller field activities. He had participated in financial statement review utilizing statistical sampling concepts and he had utilized audit retrieval packages and other data processing techniques in his work. Mr. Bachich had spent two years with the U.S. Navy International Logistics Control Office as a systems accountant responsible for correction and improvement of a newly implemented computer system. Mr. Bachich had spent nine months working as a systems accountant in the Management Support Office in the Office of Comptroller. Mr. Bachich's major efforts during his tenure here were in year-end certification and in drafting financial conversion specifications for implementation of the Standard Automated Material Management System (SAMMS) for Clothing & Textiles. During this later assignment, his supervisor, Mr. Harry Wellens, particularly praised his ability to lead a group to a satisfactory conclusion and his ability to communicate with supply, procurement and financial personnel at various grade levels.

8. Mr. Allen Wright was the only minority applicant furnished for selection. Mr. Wright has a varied financial background as an auditor, contract pricing specialist, and accountant in both

the Stock Fund and Industrial Fund at DPSC, but lacks however the statistical and data processing experience desired.

[Omitted Matter]

9. On the basis of the above, your concurrence with the selection is requested.

s/ John M. Boyle
JOHN M. BOYLE
Deputy Chief
Accounting & Finance Division

Complaint

1st Ind

DPSC-Z February 20, 1981

SUBJECT: Justification for Non-Selection of Members of Underrepresented Groups

TO: DPSC-CL

The importance of this position to the integrity of the Medical financial system cannot be overstated. It is absolutely necessary that the best candidate be selected. I have thoroughly reviewed this selection and the selection process for evidence of bias and/or discrimination; I have found none, and wholeheartedly concur with the selecting official.

s/Vardaman F. Johnson
VARDAMAN F. JOHNSON
Colonel, USAF
Acting Comptroller

Complaint

EXHIBIT B

DEFENSE LOGISTICS AGENCY
Headquarters, Defense Personnel Support Center
2800 South 20th Street
Philadelphia, Pennsylvania 19101

March 31, 1981

DPSC-C

Ref. No. 81-M-011

SUBJECT: Freedom of Information Act Request on Behalf of Mr. Allen Wright, DPSC-ZACI

Mr. Allen Wright
DPSC-ZACI

In response to your inter-office memorandum of 11 March to the Office of Civilian Personnel, which was referred to this office under the Freedom of Information Act, attached is a list of the qualified applicants referred under job opportunity announcements 1056-80 and 1057-80.

But we are unable to provide a list of the nonreferred and nonqualified applicants. Such information, if disclosed, would result in an unwarranted invasion of privacy. Its release is exempt under 5 U.S.C. 552(b)(6), and further implemented by DLA Regulation 5400.14. I have made a determination that a legitimate government purpose is being served by withholding it.

If you decide to appeal my decision to withhold portions of the information requested, it is to be made in writing to the Director,

Defense Logistics Agency, Cameron Station, Alexandria, VA 22314. It is suggested that your appeal include the basis of your disagreement.

Sincerely,

s/ E.W. Bowers
Emmett W. Bowers
Major General, USA
Commanding
Encl.

1056-80

Promotions

Anthony Bachich
Neil Bozzini
Joseph Connelly
James Danaker
Joseph Dugan
Michael Dunn
James McDermott
Anthony Tarquinto
George Toth
Joel Weiss

Optional

Mark Bodner
William Curtis
Thomas McDonnell

1057-80

Promotions

Anthony Bachich
Neil Bozzini
Joseph Connelly
Michael Dunn
Francis McDermott
James McDermott
Anthony Tarquinto
Lawrence Tartaglia
George Toth
Allen Wright

Optional

Mark Bodner
Thomas McDonnell

ANSWER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLEN J. WRIGHT, JR.

v.

DEFENSE LOGISTICS AGENCY

CIVIL ACTION NO. 81-1416

The Defense Logistics Agency, by its attorneys, Peter F. Vaira, United States Attorney in and for the Eastern District of Pennsylvania, and Antoinette R. Stone, Assistant United States Attorney in and for the same district, answers the complaint as follows:

FIRST DEFENSE

1. Paragraph 1 states a conclusion of law to which no response is required.

2. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 2.

3. Admitted.

4. Admitted.

5. Defendant admits that it replied by letter dated March 30, 1981, but denies plaintiff's characterization of the letter, because the letter speaks for itself.

Answer

6. Paragraph 6 states a conclusion of law to which no response is required.

7. Paragraph 7 states a conclusion of law to which no response is required.

8. Defendant realleges its answers to paragraphs 1, 2, and 3 as if fully set forth herein.

9. Admitted.

10. Defendant admits that it replied by letter dated March 31, 1981, but denies plaintiff's characterization of the letter, because the letter speaks for itself.

11. Paragraph 11 states a conclusion of law to which no response is required.

12. Paragraph 12 states a conclusion of law to which no response is required.

SECOND DEFENSE

Plaintiff has failed to exhaust his administrative remedies.

THIRD DEFENSE

Plaintiff has failed to state any claim upon which relief may be granted.

WHEREFORE, defendant Defense Logistics Agency respectfully requests that judgment be entered in its favor and against the plaintiff, and that the complaint be dismissed.

Respectfully submitted,

s/Peter F. Vaira
PETER F. VAIRA
United States Attorney

s/Antoinette R. Stone
ANTOINETTE R. STONE
Assistant United States Attorney

Opposition

Office - Supreme Court, U.S.
FILED
JUL 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1842

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALLEN J. WRIGHT, JR., PETITIONER

v.

DEFENSE LOGISTICS AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Aviation Data Service v. *FAA*, 687 F.2d 1319 4

Blue v. *Bureau of Prisons*, 570 F.2d 529 4

Cazalas v. *United States Dep't of Justice*, 660 F.2d 612 6

Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 5

Church of Scientology v. *United States Postal Service*, 700 F.2d 486 4

Clarkson v. *IRS*, 678 F.2d 1368 4

Education/Instruccion, Inc. v. *United States Dep't of Housing & Urban Development*, 649 F.2d 4 4

Ginter v. *IRS*, 648 F.2d 469 4

LaSalle Extension University v. *FTC*, 627 F.2d 481 5

Nationwide Bldg. Maintenance, Inc. v. *Sampson*, 559 F.2d 704 ..... 4, 6

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 5

Nix v. *United States*, 572 F.2d 998 4

Stein v. *Department of Justice & FBI*, 662 F.2d 1245 4

Page

Cases—Continued:

Vermont Low Income Advocacy Council, Inc. v. *Usery*, 546 F.2d 509 4

Werner-Continental, Inc. v. *Farkas*, 661 F.2d 935, aff'g 478 F. Supp. 815 4

Statutes:

Freedom of Information Act:

5 U.S.C. 552(a)(4)(E) 1, 2, 3
5 U.S.C. 552(b)(5) 2
5 U.S.C. 552(b)(6) 2

5 U.S.C. (Supp. V) 7201 1

Miscellaneous:

S.2543, 93d Cong., 2d Sess. (1974) 3

S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974) 3

S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974) 3

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1842

ALLEN J. WRIGHT, JR., PETITIONER

v.

DEFENSE LOGISTICS AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the denial of his request for attorney's fees and costs under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(a)(4)(E).

1. After respondent selected a different person for a position for which petitioner had applied, petitioner, a black male, requested a copy of (1) the justification for nonselection of a member of an underrepresented group (see 5 U.S.C. (Supp. V) 7201) prepared by respondent for two positions, and (2) the referral lists of all qualified and unqualified applicants for those two positions (Pet. App. 5a, 12a-13a). Respondent furnished substantial portions of the information requested. It stated that a justification for nonselection had been prepared for only one of the two positions, and it provided that justification with two deletions (*id.* at 15a; see *id.* at 17a-21a). The names of individuals who had not been selected were excised, respondent

stated, pursuant to Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), to prevent an unwarranted invasion of privacy (Pet. App. 15a-16a). Another portion of the justification was deleted pursuant to Exemption 5, 5 U.S.C. 552(b)(5), because it contained the viewpoints of officials that were part of the decisionmaking process (Pet. App. 16a). Respondent also provided petitioner with the referral lists of all qualified applicants for the two positions (*id.* at 23a; see *id.* at 25a). The lists of applicants found to be unqualified, however, were withheld under Exemption 6 based upon respondent's determination that disclosure would constitute an unwarranted invasion of privacy (Pet. App. 23a).

2. Petitioner then brought this action in the United States District Court for the Eastern District of Pennsylvania seeking production of the withheld information and attorney's fees and costs (Pet. App. 12a-14a). Thereafter, respondent released the entire nonselection justification sought by petitioner (*id.* at 5a). The parties also stipulated to the disclosure of the complete referral lists sought by petitioner, but only on condition that neither petitioner nor his counsel would disclose this information absent court approval. The district court entered an order approving the stipulation (*ibid.*).

Petitioner then moved for attorney's fees and costs pursuant to 5 U.S.C. 552(a)(4)(E).[1] Although acknowledging that petitioner had substantially prevailed in the action (Pet. App. 7a-8a), thereby meeting the threshold requirement for attorney's fees under 5 U.S.C. 552(a)(4)(E), the

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[1]That statute provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

district court held that attorney's fees should be denied as a matter of discretion under the four criteria set forth in S. Rep. No. 93-854, 93d Cong., 2d Sess. 19 (1974) (Pet. App. 6a-10a). The court of appeals affirmed without opinion (*id.* at 2a-3a).

3. The district court employed uniformly accepted criteria in considering petitioner's request for attorney's fees and costs and correctly applied those criteria to the facts of this case. Review by this Court is therefore unwarranted.

a. The FOIA, 5 U.S.C. 552(a)(4)(E), provides that a "court *may* assess against the United States reasonable attorney fees and other litigation costs" in any case in which the complainant has substantially prevailed (emphasis added). The legislative history confirms that an award of attorney's fees is discretionary. The Senate bill set forth four criteria to guide a court in exercising this discretion: "(1) 'The benefit to the public, if any[,] deriving from the case'; (2) 'the commercial benefit to the complainant'; (3) 'the nature of' the complainant's 'interest in the records sought'; and (4) 'whether the government's withholding of the records sought had a reasonable basis in law.' " S. Rep. No. 93-854, *supra,* at 19, quoting S.2543, 93d Cong., 2d Sess. (1974). Although the criteria were deleted from the bill as enacted, the Conference Report, S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 10 (1974), explained that "[b]y eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria." Congress deleted the four criteria only "because the existing body of law on the award of attorney fees recognizes such factors," so that "a statement of the criteria may be too delimiting and is unnecessary." *Ibid.*

Congress' intent has been uniformly respected by the courts of appeals. In addition to the Third Circuit in the decision below, 11 other circuits have approved the application of the four criteria.[2] The unanimous acceptance of these criteria makes plenary review by this Court unnecessary.

b. The district court did not abuse its discretion in applying the four criteria to this case. As to the first criterion —benefit to the public — the stipulation and district court order prevent the public disclosure of the referral lists of unqualified applicants, so this aspect of the suit produced little, if any, public benefit. The bulk of the other document involved, the justification for nonselection of a member of an underrepresented group, was provided to petitioner before this suit was instituted. Petitioner makes no claim that disclosure of the remaining portions of the justification contributed significantly to the public's general knowledge, particularly since petitioner was the only minority applicant considered in the document (Pet. App. 20a).

Regarding the second and third criteria — commercial benefit to petitioner and the nature of his interest in the records — the district court determined, and petitioner does not dispute (see Pet. 10-11), that "[i]t is difficult to avoid the

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[2]See *Nationwide Bldg. Maintenance, Inc.* v. *Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977); *Education/Instruccion, Inc.* v. *United States Dep't of Housing & Urban Development*, 649 F.2d 4, 7 (1st Cir. 1981); *Vermont Low Income Advocacy Council, Inc.* v. *Usery*, 546 F.2d 509 (2d Cir. 1976); *Nix* v. *United States*, 572 F.2d 998, 1007 (4th Cir. 1978); *Blue* v. *Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978); *Werner-Continental, Inc.* v. *Farkas*, 661 F.2d 935 (6th Cir. 1981), aff'g 478 F.Supp. 815 (S.D. Ohio 1979); *Stein* v. *Department of Justice & FBI*, 662 F.2d 1245, 1262 (7th Cir. 1981); *Ginter* v. *IRS*, 648 F.2d 469, 470 (8th Cir. 1981); *Church of Scientology* v. *United States Postal Service*, 700 F.2d 486, 492 (9th Cir. 1983); *Aviation Data Service* v. *FAA*, 687 F.2d 1319, 1321 (10th Cir. 1982); *Clarkson* v. *IRS*, 678 F.2d 1368, 1371 n.4 (11th Cir. 1982).

conclusion that the information sought in this action was not requested by [petitioner] for any purpose other than as a basis for a subsequent civil rights action arising out of his nonselection" (Pet. App. 9a). When a claimant possesses a personal interest in the documents or can be expected to reap a pecuniary benefit from disclosure, there is less need to provide attorney's fees and costs as an incentive to file suit. See *LaSalle Extension University* v. *FTC*, 627 F.2d 481, 484 (D.C. Cir. 1980).

Finally, as to the fourth factor — whether the government had a reasonable basis for withholding the material —the district court concluded that "the agency had at least a colorable basis for its conclusion that disclosure of the documents would inflict an unwarranted invasion of privacy" (Pet. App. 8a). The petition suggests no reasonable basis for overturning that finding.

c. Contrary to petitioner's contention (Pet. 11-12), the decision below does not conflict with any decision of this Court or any other federal court. Petitioner relies (Pet. 11) upon *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), and *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), for the proposition that a plaintiff who prevails in an action under Title II or Title VII of the Civil Rights Act of 1964 should ordinarily recover attorney's fees unless special circumstances would render an award unjust. That doctrine is inapposite here. First, as discussed above, the legislative history of the FOIA attorney's fee provision demonstrates that Congress intended a more restrictive standard. Second, this Court emphasized in *Newman* that a Title II plaintiff "cannot recover damages" and that any injunctive relief obtained is "not for himself alone," but instead "vindicat[es] a policy that Congress considered of the highest priority" (390 U.S. at 402; footnote omitted). By contrast, "it is not as easily assumed that the benefits of disclosure for individual FOIA plaintiffs will almost always

be insufficient to overcome the economic disincentives to seek judicial review." *Nationwide Bldg. Maintenance, Inc.* v. *Sampson,* 559 F.2d 704, 714 (D.C. Cir. 1977). Finally, a successful plaintiff in a Title II or Title VII suit has demonstrated a violation of federal anti-discrimination law; petitioner, on the other hand, has yet to establish any such violation.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1983

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[3]Contrary to petitioner's claim (Pet. 11-12), the decision below does not conflict with *Cazalas* v. *United States Dep't of Justice,* 660 F.2d 612 (5th Cir. 1981). *Cazalas* specifically endorsed the four discretionary criteria discussed above (660 F.2d at 619) and remanded the case for the district court to exercise its discretion under those criteria.

DOJ-1983-07